

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

WILLIAM ALEXANDER,

Petitioner,
– against –

RAYMOND COVENY,
Superintendent of Elmira
Correctional Facility, and
LETITIA JAMES, New York
State Attorney General,

Respondents.

21 Civ. 1006 (____)

**PETITIONER'S
APPENDIX
IN SUPPORT OF
PETITION FOR
HABEAS CORPUS**

JANET E. SABEL
THE LEGAL AID SOCIETY
CRIMINAL APPEALS BUREAU
199 Water Street, 5th Floor
New York, New York 10038
(212) 577-3442
WILL A. PAGE, Of Counsel
Attorney for Petitioner

TABLE OF CONTENTS

	Page
Motion for Leave to Proceed <i>In Forma Pauperis</i> (U.S. S. Ct.).....	A1 - A5
Petition for a Writ of Certiorari (U.S. S. Ct.).....	A6 - A22
Appendix Submitted with Cert. Petition (U.S. S. Ct.).....	A23 - A97
N.Y. Appellate Division Decision (Mar. 6, 2019).....	A25-A26
Trial Testimony and Trial Court Evidentiary Rulings.....	A27-A94
N.Y. Court of Appeals Leave Denial (June 27, 2019).....	A95
Copy of the Mugshot Excluded at Trial.....	A96
Relevant Constitutional Provisions.....	A97
Waiver of Response by Brooklyn District Attorney (U.S. S. Ct.).....	A98
Supreme Court Docket (Showing Request for Response) (U.S. S. Ct.)..	A99 - A100
Response by Brooklyn District Attorney to Petition (U.S. S. Ct.)	A101 - A133
Petitioner's Reply to State's Opposition to Petition (U.S. S. Ct.)	A134 - A143
Denial of Cert. Petition (Order List of Feb. 24, 2020) (excerpted)	A144 - A148

No. _____

In the
Supreme Court of the United States

WILLIAM ALEXANDER,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEW YORK,
APPELLATE DIVISION, SECOND DEPARTMENT*

**MOTION FOR LEAVE TO PROCEED
*IN FORMA PAUPERIS***

Alan S. Axelrod
Counsel of Record
Will A. Page*
LEGAL AID SOCIETY
CRIMINAL APPEALS BUREAU
199 Water Street, 5th Floor
New York, New York 10038

* *Admitted in N.Y. and
the Second Circuit*

Counsel for Petitioner

**MOTION FOR LEAVE TO PROCEED
*IN FORMA PAUPERIS***

Petitioner William Alexander moves for leave to proceed *in forma pauperis*, and to file the enclosed Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Department.

On March 30, 2015, Petitioner was granted, under New York County Law § 722, leave to so proceed in the Supreme Court of the State of New York, Appellate Division, Second Department. A copy of that court's order is attached to this motion.

Respectfully submitted,

Alan S. Axelrod

Alan Axelrod

Counsel of Record

Will A. Page

LEGAL AID SOCIETY

CRIMINAL APPEALS BUREAU

199 Water St. 5th Floor

New York, NY 10038

(212) 577-3470

AAxelrod@legal-aid.org

September 23, 2019

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

M189890
V/

RUTH C. BALKIN, J.P.
L. PRISCILLA HALL
SHERI S. ROMAN
JEFFREY A. COHEN, JJ.

2015-00834

The People, etc., respondent,
v William J. Alexander, appellant.
(Ind. No. 10999/12)

DECISION & ORDER ON MOTION
Motion for Poor Person Relief
and to Assign Counsel

Motion by the appellant pursuant to CPL 460.30 for an extension of time to take an appeal from a judgment of the Supreme Court, Kings County, rendered December 23, 2014, for leave to prosecute the appeal as a poor person, and for the assignment of counsel.

Upon the papers filed in support of the motion and the papers filed in relation thereto, it is

ORDERED that the motion is granted; and it is further,

ORDERED that the appellant's moving papers are deemed to constitute a timely notice of appeal; and it is further,

ORDERED that the appeal will be heard on the original papers (including a certified transcript of the proceedings, if any) and on the appellant's and the respondent's briefs; the parties are directed to file nine copies of their respective briefs and to serve one copy on each other; and it is further,

ORDERED that the stenographer of the trial court is directed promptly to make, certify, and file two transcripts of the proceedings of any pretrial hearings, of the plea of guilty or of the trial, and of the imposition of sentence in this action, except for those minutes previously transcribed and certified (see 22 NYCRR 671.9); and it is further,

ORDERED that in the event that the case was tried to a conclusion before a jury, the stenographer shall also make, certify, and file two transcripts of the minutes of proceedings during jury selection; and it is further,

ORDERED that the Clerk of the trial court shall furnish one certified transcript of each of the proceedings set forth above to the appellant's counsel, without charge (*see CPL 460.70*); assigned counsel is directed to turn over those transcripts to the respondent when counsel serves the appellant's brief on the respondent; and it is further,

ORDERED that in the event the stenographer has already prepared a copy of any of the minutes for a codefendant, then the Clerk of the trial court is directed to reproduce a copy thereof for assigned counsel; and it is further,

ORDERED that, upon service of a copy of this decision and order on motion upon it, the Department of Probation is hereby authorized and directed to provide assigned counsel with a copy of the presentence report prepared in connection with the defendant's sentencing, including the recommendation sheet and any prior reports on the defendant which are incorporated in or referred to in the report; and it is further,

ORDERED that in the event an issue as to the legality, propriety, or excessiveness of the sentence is raised on appeal, or if assigned counsel cites or relies upon the probation report in a brief or motion in any other way, counsel shall provide a complete copy of such report and any attachments to the court and the District Attorney's office prior to the filing of such brief or motion; and it is further,

ORDERED that pursuant to County Law § 722 the following named attorney is assigned as counsel to prosecute the appeal:

Seymour W. James, Jr., Esq.
The Legal Aid Society
199 Water Street - 5th Floor
New York, New York 10038

and it is further,

ORDERED that the appellant's time to perfect the appeal is enlarged; assigned counsel shall prosecute the appeal expeditiously in accordance with this Court's rules (*see 22 NYCRR 670.1, et seq.*) and written directions; and it is further,

ORDERED that in the event the file has been sealed, it is hereby unsealed for the limited purpose of allowing assigned counsel or his or her representative access to the record for the purpose of preparing the appeal; such access shall include permission to copy the papers insofar as they pertain to the appellant; and it is further,

ORDERED that assigned counsel is directed to serve a copy of this decision and order on motion upon the clerk of the court from which the appeal is taken.

BALKIN, J.P., HALL, ROMAN and COHEN, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court

Appellant's Address:

14-A-1476
Cape Vincent Corr. Fac.
P.O. Box 599
Cape Vincent, N.Y. 13618

No. _____

In the
Supreme Court of the United States

WILLIAM ALEXANDER,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEW YORK,
APPELLATE DIVISION, SECOND DEPARTMENT*

PETITION FOR A WRIT OF CERTIORARI

Alan S. Axelrod
Counsel of Record
Will A. Page*
LEGAL AID SOCIETY
CRIMINAL APPEALS BUREAU
199 Water Street, 5th Floor
New York, New York 10038

* *Admitted in N.Y. and
the Second Circuit*

Counsel for Petitioner

QUESTION PRESENTED

Whether *Chambers v. Mississippi*, 410 U.S. 284 (1973), and its progeny require the admission of reliable photographic evidence of what an accused was wearing on the day in question, particularly where the defense to the charges is one of misidentification, where no forensic evidence ties the accused to the crime, and where the excluded photographic evidence contradicts all eyewitness testimony.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS AND ORDERS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED....	1
INTRODUCTION	2
STATEMENT OF THE CASE.....	3
REASONS FOR GRANTING THE PETITION	9
CONCLUSION.....	13
Appendix A: Opinion of the Supreme Court of the State of New York, Appellate Division, Second Department, dated March 6, 2019	1a
Appendix B: Trial testimony and trial court evidentiary rulings.	3a
Appendix C: Leave denial from the Court of Appeals of the State of New York, dated June 27, 2019.....	71a
Appendix D: Mugshot excluded from trial	72a
Appendix E: Constitutional provisions involved ..	73a

TABLE OF AUTHORITIES

Cases

<i>Caetano v. Massachusetts</i> , 136 S. Ct. 1027 (2016)	9
<i>Chambers v. Mississippi</i> , 410 U.S. 284 (1973),	<i>passim</i>
<i>Crane v. Kentucky</i> , 476 U.S. 683 (1986)	9
<i>Holmes v. South Carolina</i> , 547 U.S. 319 (2006)	<i>passim</i>
<i>Kubsch v. Neal</i> , 838 F.3d 845 (7th Cir. 2016)	<i>passim</i>
<i>Scrimo v. Lee</i> , No. 17-3434, --- F.3d ----, 2019 WL 3924811 (2d Cir. Aug. 20, 2019)	11-12

PETITION FOR A WRIT OF CERTIORARI

William Alexander respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of New York, Appellate Division, Second Department.

OPINIONS AND ORDERS BELOW

The opinion of the Supreme Court of the State of New York, Appellate Division, Second Department appears at Appendix A and is reported at *People v. Alexander*, 93 N.Y.S.3d 608 (N.Y. App. Div. 2d Dep’t 2019). The oral rulings of the Supreme Court of the State of New York, County of Brooklyn, denying admission of Mr. Alexander’s arrest photograph were made *in limine* and appear at Appendix B.

JURISDICTION

The Second Department entered its opinion on March 6, 2019. The New York Court of Appeals denied permission to appeal in an order dated June 27, 2019, which appears at Appendix C and is reported at 33 N.Y.3d 1066 (2019). This Court’s jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant constitutional provisions from the Sixth and Fourteenth Amendments are reproduced at Appendix E.

INTRODUCTION

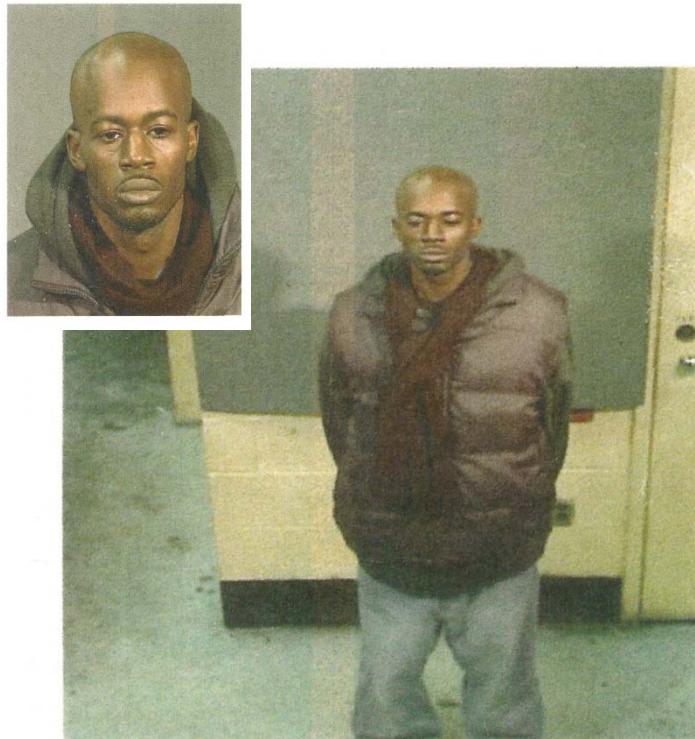
This case presents a critical opportunity for the Court to reaffirm longstanding principles of criminal constitutional law through the simple application of *Chambers v. Mississippi*, 410 U.S. 284 (1973), and its progeny to an erroneous, severely detrimental, and one-sided exclusion of defense evidence—petitioner’s mugshot. This case is unencumbered by extraneous considerations, namely AEDPA deference, making it ideal for summary treatment.

At trial, petitioner repeatedly sought to introduce his mugshot in support of his misidentification defense. The importance of the photo was simple: How could petitioner, as alleged, be the perpetrator of a robbery committed by a man wearing a distinctively bright outfit when his clothing was so drab? The robber was chased from the scene, arrested in flight, and photographed that day—and no forensic evidence tied petitioner to the crime. Thus, petitioner’s mugshot cast grave doubts on the witnesses’ identifications.

Despite urging that *Chambers* required the admission of the photo, the trial court ruled it was a) irrelevant, b) unreliable, and c) lacking foundation. In contrast, the court allowed the prosecution to introduce every photograph proffered. The court explained that “no . . . United States Supreme Court . . . law [] says that the fundamental rulings of evidence are to be twisted into an unrecognizable shape, to allow a defendant to present a defense.” (60a-61a.) This Court should summarily reverse, given the trial court’s erroneous understanding of the law and unjustifiable disparate treatment of petitioner.

STATEMENT OF THE CASE

1. In December 2012, on a Brooklyn street in the early afternoon, a man wearing a bright yellow hoodie with a blue vest committed an armed robbery. After a short chase, with the complainant and an eyewitness pursuing the suspect, officers recognized and arrested a man based on that same brightly colored outfit. That man—the armed robber—was taken to the station and photographed. Apparently, so was Mr. Alexander, who is pictured, in custody, below. (See Mugshot, App'x D.)



Petitioner's arrest photograph, above, shows what *he* was wearing that day—drab maroon colors that

could not be mistaken for the universally accepted description of the robber's yellow and blue outfit. Nevertheless, the prosecution claimed that Mr. Alexander was the man that committed the armed robbery.

2. At trial, the complainant and an eyewitness described the individual wearing the bright yellow hoodie with a blue vest who committed the armed robbery, as having the hood pulled over his head and appearing to be a teenager. They detailed how, after witnessing the robbery, the eyewitness immediately helped the complainant into his car and the two chased after the robber, who was fleeing on a bike. The eyewitness also described calling the police and relaying the description of the robber—and his bright yellow hoodie and blue vest—to the 911 operator while the two were chasing after the man on the bike.

The jury learned that New York City Police Officers Thomas and Jordan, after receiving information from the 911 call, subsequently saw a black man wearing a yellow hoodie with a blue vest ride by on a bicycle. Recognizing his brightly colored outfit, they pursued, caught, and arrested him. When the eyewitness and complainant arrived on the scene shortly thereafter, they saw a black man in a yellow hoodie and blue vest being arrested.

3. Notably, Officer Jordan testified at the Grand Jury, just as she had reported in the arrest paperwork, that she had recovered a gun from the scene of the arrest. (*See* 40a.) Indeed, she told the officer conducting the forensics investigation that she had “recovered the gun on the sidewalk[.]” But, when that officer sought a DNA sample for elimination purposes, she refused to provide one. (34a-35a.)

Her refusal was troubling enough. But then, under oath at the pre-trial hearings, she changed her story and testified that it was actually Officer Thomas who recovered the gun after they pursued the perpetrator wearing the yellow hoodie and a blue vest. (*See* 5a.)¹ Despite being the officer who took the photographs of the bike, of the recovered money, and of Mr. Alexander, Officer Jordan never testified at trial.²

4. Maintaining his innocence, petitioner attempted to introduce his arrest photograph, taken by Officer Jordan, to irrefutably show that he was not, on the day in question, the man wearing the bright yellow hoodie and blue vest. Indeed, Mr. Alexander was 39 years old, not 19, and his maroon and gray outfit resembled the robber's in style only.

The trial judge, however, repeatedly excluded the mugshot, giving ever shifting reasons for why it could not be admitted.

¹ Thomas repeated the new story at trial, testifying he used gloves to retrieve the weapon, placed it in a paper bag, and turned it over to Jordan once it was deemed safe. (14a-15a.)

² Although defense counsel agreed that there would be “no questioning regarding any pending cases” involving Officer Jordan, specifically her domestic violence charges, (37a; *see also* 50a), Jordan indicated that if she had been called as a witness she would have asserted her Fifth Amendment rights. Understandably, she was likely concerned about a) the conflict between her statements made at the Grand Jury versus during the pre-trial hearings and b) her refusal to provide a DNA sample in relation to the gun “recovered” at the scene. Indeed, at trial, everyone recognized the issue: “when [Jordan] testified under oath at [the] hearing [she] admitted that her testimony in the grand jury was *incorrect*[.]” (40a-41a (emphasis added).)

For example, the judge claimed the photo was unreliable and irrelevant, because it conflicted with the description of the perpetrator. (20a-21a.) The judge suggested Mr. Alexander could forgo his right against self-incrimination, take the stand, and “testify as to how he looked and if these were his clothes,” perhaps rendering the photo relevant and reliable. (22a.) Otherwise, the judge asserted the defense could not “get[] past the[] evidentiary issues” surrounding the photo, because there was no proof that Mr. Alexander had not changed his clothes. (42a-46a.)

But nothing other than rampant speculation was presented to render the photo, taken by the police, unreliable. The fact that it conflicted with the witnesses’ testimony actually made it all the more relevant and critical to Mr. Alexander’s misidentification defense.

Then, after the defense pushed again to introduce the photograph and argued that denying Mr. Alexander the opportunity to put this critical piece of identification related evidence before the jury violated his constitutional rights to present a defense, citing to *Chambers v. Mississippi*, 410 U.S. 284 (1973), the prosecution and the court shifted rationales. This time, the prosecution asserted there was a lack of an evidentiary foundation for the arrest photo—because the officer who took the photograph, Officer Jordan, had not testified. (57a-62a.) Of course, when Jordan was later questioned with respect to a missing witness charge, she indicated that she would have asserted her Fifth Amendment rights in a blanket fashion to avoid testifying. (69a-70a.)

Moreover, and contrary to the lack of foundation contention, Officer Jordan’s partner, Officer Thomas,

was able to confirm at trial that whomever they transported from the scene of the arrest to the precinct (whether it was the robber or Mr. Alexander) did not receive any visitors prior to being photographed.

Thus, either the photo depicted the robber, but cast grave doubts on the witnesses' veracity given the difference in his clothing, or it depicted Mr. Alexander who was, in fact, not the robber—just another man in a hoodie pulled out of lock-up and charged with the armed robbery. Or, as the defense repeatedly tried to assert, this was a case of misidentification.

Even without the photographer herself (Officer Jordan),³ Officer Thomas's testimony should have been sufficient to authenticate this photograph, which the prosecution conceded depicted Mr. Alexander. Indeed, the prosecution had no problem admitting, over defense objection, Officer Jordan's photographs of a) the bicycle that the robber was riding and b) the money recovered from the actual robber. (8a-10a; 11a-13a.)

³ When the defense sought a missing witness charge, after being denied the ability to question Jordan as a hostile witness, (55a-56a), the court questioned her directly. The judge asked, "If you were called to the stand on this case, would you have asserted your Fifth Amendment privileges [to] not testify?" (69a.) Jordan indicated that, "Yes," she "would have." (*Id.*)

The defense then tried to examine her about her actions as "the arresting officer in the case" to establish the extent of her adversity, but the court cut-off any questioning. (70a.) The defense could not clarify whether her Fifth Amendment refusal related to "her open case" or to "the arrest of Mr. Alexander," because the court allowed no further questions. (*Id.*)

Apparently, whenever the prosecution sought to admit photos through Officer Thomas—the only police witness made available—the evidentiary foundation was unquestioned. But when Mr. Alexander tried to admit a reliable and contemporaneous depiction of what he was wearing on the day of the robbery, the court would not budge. Most relevantly, the trial court stated that it knew of “no . . . United States Supreme Court . . . law that says that the fundamental rulings of evidence are to be twisted into an unrecognizable shape, to allow a defendant to present a defense. All defenses that are presented must comply with the rules of evidence.” (60a-61a.)

With the photo excluded, petitioner was convicted and sentenced to 25 years of imprisonment.

5. On direct appeal, the Appellate Division, Second Department, of the Supreme Court of New York determined that there was no foundation for the admission of the photograph and, in any event, the failure to admit it was harmless. (App’x A.)

The Appellate Division did not engage with the constitutional issues presented, nor did it mention that the only other piece of physical evidence recovered—the gun—had never been handled by Mr. Alexander. The prosecution’s own DNA expert had concluded it was over 350 times more likely that three random people had handled the gun than petitioner.

Thus, the allegedly overwhelming evidence of guilt in this case was apparently the eyewitnesses’ and testifying officer’s testimony that Mr. Alexander was the man in the yellow hoodie, even if that is not what was depicted in the photo.

New York's highest court, the Court of Appeals, denied leave to appeal on June 27, 2019. (App'x C.)

REASONS FOR GRANTING THE PETITION

Mr. Alexander is serving 25 years for an armed robbery committed by a man wearing a yellow hoodie and a blue vest. Since *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Crane v. Kentucky*, 476 U.S. 683 (1986), the rules have been clear: “the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense,’” *Crane*, 476 U.S. at 690, and where those “constitutional rights directly affecting the ascertainment of guilt are implicated,” evidentiary rules “may not be applied mechanistically to defeat the ends of justice,” *Chambers*, 410 U.S. at 302. Nevertheless, time and time again this Court has had to remind the States of the vitality of these important protections against “arbitrary” rules. *See Holmes v. South Carolina*, 547 U.S. 319, 325-26 (2006) (considering the examples from *Washington v. Texas*, *Chambers*, *Crane*, and *Rock v. Arkansas* in reversing another arbitrary application of a State rule of evidence). Because this case is just another example in a long line of such deprivations, error correction via summary reversal is appropriate. *See, e.g., Caetano v. Massachusetts*, 136 S. Ct. 1027, 1028 (2016) (per curiam) (where the “explanation the Massachusetts court offered for upholding [a] law [prohibiting stun guns] contradict[ed] this Court’s [recent] precedent,” certiorari granted, state judgment vacated, and the case remanded).

Despite this Court’s strenuous warning against the danger of excluding defense evidence after “evaluating the strength of only [the prosecution’s] evidence,” *Holmes*, 547 U.S. at 331, the trial court in this case committed exactly the same error. When the trial judge concluded that the conflict between the witnesses’ description of the perpetrator and the photo of Mr. Alexander rendered the photographic evidence unreliable or irrelevant, the court committed the same single-sided error in logic as in *Holmes*. “The point is that, by evaluating the strength of only one party’s evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt.” *Holmes*, 547 U.S. at 331.

Moreover, there is a fundamental inequity in allowing the prosecution to present photographs taken by an officer who does not testify, only to bar the admission of similar photographs when introduced by the defense. Two adages intersect in this case: “what is good for the goose is good for the gander” and “a picture is worth a thousand words.” The prosecution benefitted from the photos in this case, while Mr. Alexander was denied the same opportunity. Perhaps this stark—and unjustifiable—disparate treatment explains why defense counsel repeatedly raised the issue, arguing again and again with the trial judge that this photograph had to be admitted in order to preserve petitioner’s constitutional right to present a defense. Indeed, the exclusion of such evidence in similar circumstances is so contrary to this Court’s established precedent as to warrant habeas relief. *See, e.g., Kubsch v. Neal*, 838 F.3d 845, 858 (7th Cir. 2016) (en banc) (discussing the well-established “lessons

from the *Chambers* line of cases” with respect to the erroneous exclusion of exculpatory videotaped interviews of two witnesses); *see also Scrimo v. Lee*, No. 17-3434, --- F.3d ----, 2019 WL 3924811, at *14 (2d Cir. Aug. 20, 2019) (habeas granted after *Chambers* violation, unaddressed by Second Department, deprived accused of chance to introduce reasonable doubt).

The jury never had a chance to see the photo for themselves. The issue of how Mr. Alexander could be the perpetrator—when the robber was never out of sight long enough to have performed a miraculous wardrobe change—was never fully presented to the jury because they could not compare the contemporaneous photograph to the witnesses’ descriptions for themselves. Although they heard that a photo existed that showed him in “different clothes,” they could not weigh the witnesses’ credibility against photographic proof of what Mr. Alexander was actually wearing. They could not decide whether the wrong black man in a hoodie had been pulled out of lock-up or off the street and charged with someone else’s offenses.

Summary reversal is appropriate here for many of the reasons recognized by the circuit in *Kubsch*. First, this case, like the *Chambers* line of cases, deals with the exclusion of evidence directly relevant to the asserted defense—misidentification. Second, the evidence was essential: it was photographic evidence of what Mr. Alexander was wearing at the time of his arrest, which directly contradicted the witnesses’ description of the perpetrator. Third, the photograph was reliable, as it was police-generated. And, in contrast to *Holmes*, the collateral evidence (the forensic evidence) did not match petitioner.

His DNA was not found on the handgun recovered at the scene; instead, it was at least 350 times more likely that the DNA “mixture” that was recovered did not include any genetic material from Mr. Alexander.

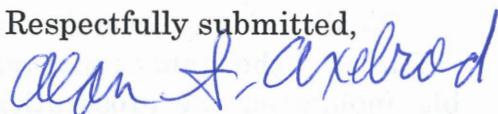
Finally, as the Seventh Circuit eloquently stated in *Kubsch*, “the state cannot regard evidence as reliable enough for the prosecution, but not for the defense.” *Kubsch*, 838 F.3d at 858. The “lack of parity,” *id.*, was on full display in this case, where the prosecution was allowed to admit photographs taken by the non-testifying officer but the defense was not. If the photographic evidence in this case was reliable enough for the prosecution, then it should have been reliable enough for Mr. Alexander to present his complete misidentification defense. Instead, “the jury never [saw] a critical additional piece of evidence, which, if credited, would have permitted them to find that the police had the wrong man.” *Id.* at 850; *see also Scrimo*, 2019 WL 3924811, at *14 (“wrongfully excluded testimony would have introduced reasonable doubt where none otherwise existed”).

Recognizing that the trial court’s exclusion of Mr. Alexander’s arrest photo runs afoul of *Chambers* and its progeny, including *Holmes*, this Court should grant the petition to correct an error of constitutional dimension, vacating petitioner’s conviction, and remanding the case for further proceedings.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,



Alan Axelrod

Counsel of Record

Will A. Page

LEGAL AID SOCIETY

CRIMINAL APPEALS BUREAU

199 Water St. 5th Floor

New York, NY 10038

(212) 577-3470

AAxelrod@legal-aid.org

September 23, 2019

APPENDIX

TABLE OF CONTENTS

Appendix A:	Supreme Court of the State of New York, Appellate Division, Second Department opinion, March 6, 2019.	1a
Appendix B:	Trial testimony and trial court evidentiary rulings.	3a
Appendix C:	Court of Appeals of the State of New York leave denial, June 27, 2019.	71a
Appendix D:	Mugshot excluded from trial. .	72a
Appendix E:	Constitutional provisions involved.	73a

1a

APPENDIX A

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D58399
G/afa

____AD3d____

Argued - December 7, 2018

WILLIAM F. MASTRO, J.P.
JEFFREY A. COHEN
JOSEPH J. MALTESE
HECTOR D. LASALLE, JJ.

2015-00834

DECISION & ORDER

The People, etc., respondent,
v William Alexander, appellant.

(Ind. No. 10999/12)

Janet E. Sabel, New York, NY (Anita Aboagye-Agyeman and Will Page of counsel),
for appellant.

Eric Gonzalez, District Attorney, Brooklyn, NY (Leonard Joblove, Jean M. Joyce,
and Sullivan & Cromwell LLP [Michele C. Materni], of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Kings County
(Vincent Del Giudice, J.), rendered December 23, 2014, convicting him of robbery in the first degree
and criminal possession of a weapon in the second degree, upon a jury verdict, and imposing
sentence.

ORDERED that the judgment is affirmed.

Contrary to the defendant's contention, the Supreme Court providently exercised its
discretion in excluding a photograph from evidence, as the defendant failed to lay a sufficient
foundation for its admission (see *People v Price*, 29 NY3d 472, 479-480; cf. *People v Wells*, 161
AD3d 1200; *People v Marra*, 96 AD3d 1623, 1626, *affd* 21 NY3d 979). In any event, even if
erroneous, the failure to admit the photograph was harmless, as the proof of the defendant's guilt was
overwhelming and there is no significant probability that the jury would have acquitted the defendant
had the photograph been admitted (see *People v Crimmins*, 36 NY2d 230).

March 6, 2019

Page 1.

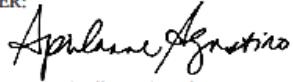
PEOPLE v ALEXANDER, WILLIAM

2a

The sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80).

MASTRO, J.P., COHEN, MALTESE and LASALLE, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court

March 6, 2019

PEOPLE v ALEXANDER, WILLIAM

Page 2.

3a

APPENDIX B

BEFORE: HONORABLE RUTH SHILLINGFORD, JUSTICE

APPEARANCES:

CHARLES J. HYNES, ESQ.
District Attorney, Kings County
BY: STEPHANIE ROSENFELD, ESQ.
Assistant District Attorney

THE LEGAL AID SOCIETY
Attorney for Defendant
BY: STEVEN KLIMAN, ESQ.
BY: CLINTON HUGHES, ESQ.

GEORGE DAVID DAVILA
SENIOR COURT REPORTER

4a

DIRECT - P.O. JORDAN - ROSENFELD

9

1 Q. Once you saw the defendant riding on his bike, what
2 happened next?

3 A. We actually made a U-turn. He passed me and we
4 actually made a U-turn. So we were actually driving the
5 opposite way of traffic. We put our lights and sirens. I put
6 my window down, told him to stop and he continued to ride his
7 bike.

8 Q. And what happened after?

9 THE COURT: One moment, please.

10 MS. ROSENFELD: I apologize.

11 THE COURT: You indicated that you told him to
12 stop?

13 THE WITNESS: Yes.

14 THE COURT: Continue.

15 Q. After you told him to stop what happened?

16 A. He continued to ride his bike. He actually attempted
17 to go on the curb.

18 Q. What happened when he attempted to go on the curb?

19 A. He actually fell. So I jumped out of the vehicle. I
20 grabbed him but before I grabbed him, he pulled out a weapon
21 and threw it to his side, to his right.

22 Q. Did you see what type of weapon it was?

23 A. It was a nine millimeter pistol.

24 Q. Now, after you saw him throw the pistol to the side
25 and then you saw him on the ground, what did you do?

5a

	DIRECT - P.O. JORDAN - ROSENFELD	10
1	A. Well, he got up on his own and threw the gun to the	
2	side. I just grabbed him and we cuffed him.	
3	Q. Just backtracking a little bit, was that gun that was	
4	thrown to the side ever recovered?	
5	A. Yes.	
6	Q. Who recovered it?	
7	A. My partner, Officer Thomas.	
8	Q. What type of gun was it?	
9	A. It was a nine millimeter.	
10	Q. Was it loaded?	
11	A. Yes.	
12	Q. Now, after you stopped the defendant did you ever have	
13	a chance to meet with the victim?	
14	A. Yes.	
15	Q. Do you remember the victim's name?	
16	A. Yudelka Veras.	
17	THE COURT: Veros?	
18	THE WITNESS: Veras with an "S".	
19	Q. How did you come to meet the victim?	
20	A. She actually came to the scene and identified the	
21	perpetrator.	
22	Q. How did she come to the scene?	
23	A. She was actually in a friend's car, I think. She was	
24	in another car. She wasn't in a police car.	
25	Q. When she came to the scene, did you have a chance to	

6a

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF KINGS: CRIMINAL TERM: PART: 25
3 -----X
4 PEOPLE OF THE STATE OF NEW YORK, :
5 : Indictment
6 : No. 10999/i2
7 -against- :
8 WILLIAM ALEXANDER, :
9 :
10 : Defendant.
11 :-----X
12 :
13 :
14 :
15 :
16 :
17 :
18 :
19 :
20 :
21 :
22 :
23 :
24 :
25 :
320 Jay Street
Brooklyn, New York
December 1, 2014
BEFORE:
HONORABLE VINCENT DELGIUDICE,
Justice of Supreme Court
APPEARANCES:
KENNETH P. THOMPSON, ESQ.
DISTRICT ATTORNEY KINGS COUNTY
BY: STEPHANIE ROSENFIELD, ESQ.
DAVID RASKIN, ESQ.
Assistant District Attorneys
LEGAL AID SOCIETY
175 Remsen Street
Brooklyn, New York 11201
BY: BHARATI NARUMACHI, ESQ.
CLINTON HUGHES, ESQ.
Attorneys for the Defendant
MERCEDES FERNANDEZ,
Official Spanish Interpreter
PHYLLIS PRICE
SCOTT ISAACS
OFFICIAL COURT REPORTERS

1

PP

7a

Direct - PO Thomas

75

1 A Him right there, with the white shirt.

2 THE COURT: Indicating the defendant.

3 MS. ROSENFIELD: Thank you, your Honor.

4 Q Now you said you saw the defendant riding a bike down
5 Fulton Street.

6 Is that going towards Chestnut Street, or away from
7 Chestnut Street?

8 A Away from Chestnut Street.

9 Q Now, after you saw the defendant riding the bike,
10 what happened next?

11 A He rode past us, at the point.

12 When he got to my vehicle, he made eye contact with
13 me and my partner, and I made eye contact with him.

14 Q And after you made eye contact with him?

15 A I put the turret lights on the vehicle. I turned the
16 vehicle around. I drove behind the defendant, and hit the
17 siren.

18 Q Did you ever lose sight of the defendant?

19 A No.

20 Q Was your view of the defendant ever obstructed by
21 anything?

22 A No.

23 Q Now, you are following the defendant. What happens?

24 A When I got close to behind him, I hit I siren. And
25 he jumped off the bike, and threw the gun to the ground.

PP

8a

Direct - PO Thomas

76

1 Q Had you instructed the defendant to stop?

2 A Yes.

3 Q How did you do that?

4 A Police, stop, don't move.

5 Q And did the defendant stop?

6 A Yes.

7 Q Then what happened?

8 A He put his hands up. My partner had him at gunpoint,
9 while I went over to the side of him to put the handcuffs on
10 him.

11 Q Now, you said you saw the defendant throw something.

12 A What did you see him throw?

13 A A black handgun.

14 Q And where did he throw the gun to?

15 A On the sidewalk.

16 Q Now, did you ever hit the defendant with your police
17 vehicle while he was on the bicycle?

18 A Never.

19 MS. ROSENFIELD: I'd like to have this marked as
20 People's number Two for identification.

21 (People's 2, marked for identification.)

22 Photo of bike

23 Q Officer, do you recognize what's been handed to you
24 as People's number Two for identification?

25 A Yes.

PP

9a

Direct - PO Thomas - Voir Dire

77

1 Q What do you recognize it to be?

2 A The black bicycle he was riding that day.

3 Q Is that photo a fair and accurate representation of
4 what the defendant's bike looked like on December 29th 2012?

5 A Yes.

6 MS. ROSENFIELD: I would like to have this moved
7 into evidence as People's number Two in evidence.

8 THE COURT: Voir dire or exception, Counsel?

9 MS. NARUMACHI: If I may voir dire?

10 THE COURT: Go right ahead.

11 VOIR DIRE EXAMINATION

12 BY MS. NARUMACHI:

13 Q Who took that photograph?

14 A The arresting officer.

15 Q And who is the arresting officer in this case?

16 A Officer Jordan.

17 Q Do you know when that photo was taken?

18 A The day of.

19 Q And how do you know that?

20 A She told me.

21 Q She told you that she took that photo?

22 A Yes.

23 Q You weren't present when that photo was taken?

24 A No.

25 Q You did not process any of the voucher paperwork --

PP

10a

1 Direct - PO Thomas 78

2 THE COURT: Sustained. What does that have to
3 do, it is an exhibit.

4 Voir dire on the photograph.

5 MS. NARUMACHI: I apologize, Judge.

6 (Whereupon, counsel confers with co-counsel.)

7 MS. NARUMACHI: Judge, I would argue it goes to
8 authenticating the bike.

9 THE COURT: You have an objection to it?

10 MS. NARUMACHI: I do have an objection.

11 THE COURT: Your objection is overruled.

12 That is the bike you saw?

13 THE WITNESS: Yes.

14 THE COURT: It is in evidence.

15 (People's 2 marked in evidence.)

16 Photo of bike

17 MS. ROSENFELD: If I may publish it to the jury
18 now?

19 THE COURT: Go ahead.

20 (Whereupon, exhibit published to the jury.)

21 Q Officer, again, you recognize this bike?

22 A Yes.

23 Q Where do you recognize it from?

24 A The defendant was riding on December 29th.

25 Q Thank you very much.

After the defendant had stopped, and after he threw

PP

11a

Direct - PO Thomas

83

1 (Whereupon, the following was held in open court
2 before the jury.)

3 THE COURT: Okay, Miss Rosenfeld.

4 MS. ROSENFELD: Thank you.

5 Q Officer, looking at People's number Three for
6 identification.

7 Who recovered the actual money off of the defendant?

8 A I did.

9 Q And once you recovered that money off of the
10 defendant, what did you do with it?

11 A I handed it to Officer Jordan.

12 Q Did you see what Officer Jordan did with it?

13 A No.

14 Q Did you see how this photocopy was made?

15 A No.

16 Q Officer, now when you recovered the money off of the
17 defendant, did you take a look at it?

18 A Yes.

19 Q And how much money do you recall there to be?

20 A \$40.

21 Q And what were the denominations?

22 A \$20 and two 10s.

23 Q And is this photocopy a fair and accurate
24 representation of the money that you recovered off the
25 defendant on December 29th 2012?

PP

12a

Direct - PO Thomas - Voir Dire

84

1 A Yes.

2 MS. ROSENFIELD: At this time, I would ask it be
3 received into evidence as People's number Three.

4 THE COURT: Voir dire?

5 MS. NARUMACHI: Yes.

6 VOIR DIRE EXAMINATION

7 BY MS. NARUMACHI:

8 Q You testified you recovered an amount of money from
9 Mr. Alexander?

10 A Yes.

11 Q Was it 20 and two \$10 bills?

12 A Yes.

13 Q Do you know the serial numbers on those dollars,
14 those items?

15 A No.

16 Q And you didn't see the money, what happened with the
17 money after you gave it to Officer Jordan?

18 A No.

19 Q And you didn't see the photocopying of those bills
20 that are in front of you?

21 A Can you repeat the question?

22 Q You didn't see a photocopy made of that money, did
23 you?

24 A No.

25 MS. NARUMACHI: I would object, Judge.

PP

13a

Direct - PO Thomas - Voir Dire 85

1 THE COURT: Let me ask you a question.
2 You gave Jordan 40 bucks, right?
3 THE WITNESS: Yes.
4 THE COURT: 20 and two 10s?
5 THE WITNESS: Yes.
6 THE COURT: She comes back to you, and she has a
7 picture of a \$20 bill, and two 10s, the photostat?
8 THE WITNESS: On the day no, she didn't.
9 THE COURT: Did Jordan photostat the \$20 bill,
10 and two 10s that you took from the defendant's pocket?
11 THE WITNESS: Yes.
12 THE COURT: Is that the photostat?
13 THE WITNESS: Yes.
14 THE COURT: It is in evidence.
15 MS. NARUMACHI: I would object.
16 THE COURT: Fine. You have grounds for appeal.
17 Goes to weight not admissibility.
18 (People's 3 marked in evidence.)
19 Photo of currency
20 MS. ROSENFIELD: At this time, I would like
21 People's number Three to be taken out of the packaging so
22 I could publish it to the jury.
23 THE COURT: Show her on the overhead.
24 THE COURT: I think everybody saw a \$20 bill,
25 and two 10's.

PP

14a

Direct - PO Thomas

86

1 Okay, let's move on.
2 THE COURT: Officer, at the time you searched
3 the defendant and recovered the \$40, did you recover any
4 other money from the defendant?
5 A No.
6 Q After you finished searching the defendant, what did
7 you do next?
8 A I placed him in the vehicle. And recovered the gun.
9 Q And where did you find the gun?
10 A On the sidewalk.
11 Q And did you pick the gun up?
12 A Yes.
13 Q Did you use anything to pick the gun up with?
14 A Gloves.
15 Q And what type of gun was it?
16 A A black .9-millimeter.
17 Q Was it loaded?
18 A Yes.
19 Q What did you do with the gun after you picked it up?
20 A I put it in a paper bag, and put it in the back seat.
21 Q Why did you do that?
22 A So I wouldn't get my fingerprints on it. And for
23 security.
24 Q And what did you do with the gun after you put it in
25 the back seat of your vehicle?

PP

15a

Direct - PO Thomas

87

1 A We went back to the precinct to call ESU, the
2 detective and a police officer, to make sure it was rendered
3 safe.

4 Q And after it was rendered safe by ESU, what was done
5 with the gun?

6 A They handed it to Officer Jordan.

7 Q What happened next?

8 A Officer Jordan took a photograph of it.

9 Q And after the gun was photographed, what happened
10 next?

11 A After that, I went home.

12 Q Before you went home, was the gun ever given to ECT?

13 A Yes.

14 Q What is ECT?

15 A Evidence collection.

16 Q And after the gun was processed by ECT, do you know
17 what Officer Jordan did with the gun?

18 A No.

19 Q Was the gun ever vouchered?

20 A Yes.

21 Q Do you know what voucher number was given to the gun?

22 A Yes.

23 Q What was the voucher number of the gun?

24 A 3000161995.

25 Q And, Officer, did you bring the gun with you here

PP

16a

Direct - PO Thomas

88

1 today?

2 A Yes.

3 MS. ROSENFIELD: I would like to have that marked
4 as People's number Four for identification.

5 THE COURT: Okay.

6 (People's 3, marked for identification.)

7 Handgun

8 Q Sir, the gun that you brought with you today, you
9 recognize it?

10 A Yes.

11 Q And what do you recognize it to be?

12 A A black .9-millimeter handgun.

13 Q And is that the gun that you recovered off the ground
14 on December 29th 2012?

15 A Yes.

16 THE COURT: I think we are going to take a
17 luncheon recess right now.

18 Ladies and gentlemen, I ask you to come back at 2:15,
19 okay.

20 Please keep an open mind.

21 Don't form, or express any opinions, or conclusions
22 with respect to the evidence in the case until I submit it
23 to you for your deliberations.

24 Don't discuss this case amongst yourselves, or with
25 anyone else.

PP

P.O. Remel Thomas - Cross - Narumanchi

1 gun far away from Mr. Alexander?

2 A No.

3 Q Isn't it true that the gun was not recovered next to
4 him?

5 A The gun was recovered approximately four feet from
6 him.

7 Q Now, as the arresting officer in this case, Officer
8 Jordan is the person who completed the police reports in this
9 case?

10 A Yes.

11 Q And, for example, she completed the arrest report?

12 A Yes.

13 Q She completed the complaint report?

14 A Yes.

15 Q And she also took the gun to the ECT Unit?

16 A Yes.

17 MS. NARUMANCHI: Now, I would like to hand up to
18 Officer Thomas what has been marked as Defense Exhibit A
19 for identification only.

20 Q Now, Officer Thomas, directing your attention to that
21 photo, do you recognize this photo?

22 A I recognize the person in the photo, but he's wearing
23 different clothes.

24 Q Was this photo taken on December 29th of 2012?

25 A Yes.

si

18a

106

P.O. Remel Thomas - Cross - Narumanchi

1 Q Was it taken at the 75th Precinct?
2 A Yes.
3 Q And what do you recognize this photo to be?
4 A A photo of the defendant dressed in different clothes.
5 Q Is it an arrest photograph?
6 A Yes.
7 Q And when arrest photographs are taken, they are taken
8 at the police precinct after arrests; right?
9 A Yes.
10 Q And typically, the arresting officer is present during
11 that photograph being taken?
12 A Not always.
13 Q Not always. But typically there?
14 A Yes.
15 Q And does it fairly and accurately represent how
16 Mr. Alexander appeared on December 29th of 2012?
17 A Mr. Alexander was wearing multiple clothes that he
18 could have exchanged.
19 Q Other than the colors of the clothing, does it fairly
20 and accurately represent how Mr. Alexander appeared on
21 December 29th of 2012?
22 A It's Mr. Alexander but in different clothes.
23 Q I understand that. Does it fairly -- outside of the
24 colors of the clothing, does it fairly and accurately represent
25 how he appeared on December 29th of 2012?

si

P.O. Remel Thomas - Cross - Narumanchi

1 A Yes.

2 MS. NARUMANCHI: At this time, Judge, I would
3 like to move this into evidence.

4 THE COURT: Voir dire?

5 MS. ROSENFELD: First the People would like to
6 note their objection. Yes, a quick voir dire.

7 THE COURT: Usually it's the other way around, I
8 would think.

9 VOIR DIRE EXAMINATION

10 BY MS. ROSENFELD:

11 Q Officer, what was the defendant wearing at the time
12 that you saw him on the street?

13 THE COURT: Sustained.

14 Q Officer, do you recall what the defendant was wearing
15 when you first saw him?

16 A Yes.

17 Q What was he wearing?

18 THE COURT: Sustained. It's going to the
19 admissibility of the photograph, not what the defendant was
20 wearing. He already said that he changed his clothes.

21 Q So, Officer, this photo, is it representing what the
22 defendant was wearing at the time you first saw him on the
23 street?

24 A No.

25 Q So it does not fairly and accurately represent what he

si

20a

108

Side bar

1 looked like at the time you first saw him?

2 A No.

3 MS. ROSENFIELD: The People note their objection.

4 THE COURT: Side bar.

5 (The following occurs at side bar out of the
6 presence of the jury.)

7 THE COURT: Okay. I would just like an offer of
8 proof as to what the relevance of the photograph is.

9 MS. NARUMANCHI: Judge, it's relevant to the
10 theory of the defense that we have already said in our
11 opening it's mistaken identification, and Mr. Alexander was
12 not the individual who robbed Ms. Veras, that his clothing
13 was substantially different than the description of the
14 perpetrator, and that's why it's relevant to this case.
15 It's very key to the defense case.

16 THE COURT: Both witnesses, this officer and
17 Villafane, indicated this is a picture of the defendant
18 who's on trial but he's changed his clothes. So they
19 already indicated that's the facial features, that's the
20 man, but the outer garments that he has on, to wit, just
21 the jacket and the scarf are different because he still has
22 the jeans on.

23 MR. HUGHES: I'm sorry to interrupt --

24 THE COURT: Only the attorney that's -- I'll give
25 you as much time as you want to, but I don't see how it's

si

21a

109

Side bar

1 relevant if both witnesses indicated this wasn't the
2 clothing he was wearing.

3 MS. NARUMANCHI: Well, Judge, but it was a
4 photo --

5 THE COURT: Are you going to bring in testimony
6 to establish this was the clothes he was wearing at the
7 time of the offense?

8 MS. NARUMANCHI: Well, I mean they are going to
9 deny that that was the clothing that he was wearing at the
10 time of the offense.

11 THE COURT: So far three witnesses have
12 testified --

13 MS. NARUMANCHI: I understand.

14 THE COURT: -- that he had a yellow hoodie and a
15 blue vest with jeans. This shows the person dressed in a I
16 guess a bubble jacket with a scarf at the precinct.

17 MS. NARUMANCHI: It's a gray hoodie. This was a
18 photo taken of him at the precinct while he was under the
19 control of the officers. And I could continue to question
20 on that, but --

21 THE COURT: What's the relevance?

22 MS. NARUMANCHI: It's relevant to the
23 identification, Judge. We're arguing it's not him, that
24 he's not the perpetrator, and that they are wrong. They
25 arrested an African American man wearing similar clothing.

si

22a

113

Side bar

1 think that that is actually relevant to the question on
2 those colors and whether or not he could have actually
3 changed his clothing in the precinct. He was escorted
4 directly from the site to the precinct. He was in their
5 custody the entire time, so I think it does go to our
6 defense.

7 But additionally, in terms of the police officers
8 and questioning on that, it also goes to a motive to lie
9 about a variety of different issues in this case.

10 THE COURT: Okay. Your application is denied.
11 It's not coming into evidence. I believe you haven't
12 sufficiently established how it's probative. Maybe if your
13 client wants to take the stand, he could testify as to how
14 he looked and if these were his clothes. But so far three
15 witnesses, three separate witnesses all indicated at the
16 scene of the arrest the clothing he had worn, and two of
17 them looked at this piece of evidence and said that's him,
18 but his clothing has been changed.

19 Okay. So I find this to be not reliable and is
20 not to your point. If there is some kind of sponsoring
21 testimony that this was the clothing that he was wearing
22 and they arrested the wrong guy, and these three witnesses
23 were under some mass delusion, I'll let it come in.

24 (Back in open court.)

25 CROSS EXAMINATION - CONTINUED

si

23a

114

P.O. Remel Thomas - Cross - Narumanchi

1 BY MS. NARUMANCHI:

2 Q Now, Officer Thomas, we were discussing the fact that
3 Officer Jordan is the arresting officer in this case.

4 Now, you were with Officer Jordan when Mr. Alexander
5 was arrested; correct?

6 A Yes.

7 Q And you along with Officer Jordan escorted him to the
8 precinct?

9 A Yes.

10 Q And at the precinct he was processed for an arrest?

11 A Yes.

12 Q And we had just discussed as part of that processing,
13 photos were taken; correct?

14 A Yes.

15 Q Now, typically -- he didn't have any visitors at the
16 precinct; did he?

17 A No.

18 Q And did you voucher any of the clothing that he was
19 wearing that day?

20 A No.

21 Q And I had just shown you a photograph for
22 identification. You said that the colors of the clothing were
23 different; correct?

24 A Yes.

25 Q You maintain a memo book as part of your duties as a

si

24a

115

P.O. Remel Thomas - Cross - Narumanchi

1 police officer?

2 A Yes.

3 Q And the photo that I showed you was taken that day, on
4 December 29th of 2012?

5 A Yes.

6 Q And it was taken at your precinct, the 75th
7 Precinct?

8 A Yes.

9 Q Now, part of writing notes in your memo book is you
10 notate things that happened while you are on duty; right?

11 A Yes.

12 Q And that day you noted down a description of a
13 perpetrator in the robbery?

14 A Yes.

15 Q And you noted in your memo book that he was wearing a
16 yellow hoodie?

17 A Yes.

18 Q And a blue vest?

19 A Yes.

20 Q Now, you didn't note that he was wearing different
21 clothing at the precinct?

22 A No.

23 Q You didn't note that the colors of the ski vest were
24 different than the description that you received?

25 A No.

si

25a

118

P.O. Remel Thomas - Cross - Narumanchi

1 THE COURT: Next witness.
2 MR. RASKIN: Your Honor, the People are calling
3 Police Officer Kevin Hutchinson.
4 COURT OFFICER: Witness entering.
5 THE COURT: Very well.
6 COURT OFFICER: Remain standing. Face the clerk.
7 THE CLERK: Please raise your right hand.
8 KEVIN HUTCHINSON, was called as a witness by and
9 on behalf of the People, having been first duly sworn by
10 the Clerk of the Court, testified as follows:
11 THE CLERK: Be seated. Please state your name
12 and spell it for the record.
13 THE WITNESS: Officer Kevin Hutchinson,
14 K-E-V-I-N, H-U-T-C-H-I-N-S-O-N.
15 THE CLERK: Shield number?
16 THE WITNESS: Shield 18979.
17 THE CLERK: And command?
18 THE WITNESS: Brooklyn North Evidence Collection
19 Team.
20 THE CLERK: Thank you.
21 THE COURT: Thank you. How are you doing?
22 THE WITNESS: How are you doing, sir?
23 THE COURT: Welcome to my courtroom. I ask you
24 to do three things, speak right into the microphone, look
25 the jury in the eye when you answer, and if you hear the

si

26a

119

P.O. Remel Thomas - Cross - Narumanchi

1 word "objection", say no.

2 THE WITNESS: You got it.

3 THE COURT: Thank you.

4 DIRECT EXAMINATION

5 BY MR. RASKIN:

6 Q By whom are you employed?

7 A New York City Police Department.

8 Q In what capacity?

9 A Police Officer.

10 Q How many years have you been a police officer?

11 A Twelve years now.

12 Q How many years have you been assigned to ECT?

13 A Six years.

14 Q Just describe to the jury what ECT stands for.

15 A It stands for Evidence Collection Team.

16 Q As an officer assigned to the Evidence Collection
17 Team, what are your duties and responsibilities?

18 A Basically we go to crime scenes and try to collect any
19 evidence that's left at the scene.

20 Q What kind of cases do you become involved in in that
21 capacity?

22 A Become involved in burglaries, robberies, shootings
23 that are non-fatal, and gun cases.

24 Q And what do you do specifically when you become
25 involved in those type of cases?

si

P.O. Kevin Hutchinson - Direct - Raskin

1 A Well, we go through the scene and we try to process
2 whatever is at the scene.

3 Q I'm going to direct your attention to December 29,
4 2012. Did you become involved in an investigation into an
5 incident that occurred on Chestnut Street in Brooklyn?

6 A Yes.

7 Q How did you become involved in that?

8 A We had a call saying that there was a robbery with a
9 gun that was recovered at the location.

10 Q What exactly did you do with respect to that
11 investigation?

12 A Well, I responded to the 75th Precinct where the gun
13 was brought back to, and I processed the firearm there.

14 Q Just describe to the jury what you did in the
15 processing of that firearm?

16 A Well, I swabbed the firearm for DNA. Basically, we
17 have like a long Q-tip, we put distilled water on the tip of
18 the cotton swab, and we swab the area of the firearm that was
19 touched the most.

20 Q Why would you swab a firearm?

21 A Just to see who was handling the firearm.

22 Q You mentioned DNA. Were there any other reasons why
23 you would swab a firearm?

24 A Any other reason?

25 Q Yes.

si

28a

121

P.O. Kevin Hutchinson - Direct - Raskin

1 A Like I say, just to find out who touched the firearm.

2 Q Did you also swab to get a fingerprint?

3 MR. HUGHES: Objection, Your Honor, to the
4 leading.

5 THE COURT: Overruled. I could allow a little
6 bit of latitude.

7 A We dust the firearm for fingerprints.

8 Q In this case, where exactly did you respond to?

9 A The 75th Precinct.

10 Q And once you arrived at the 75th Precinct, what were
11 you given?

12 A I was given a black Kel-Tec .9-millimeter pistol.

13 Q What did you do once you received that gun?

14 A I began processing, I began swabbing the different
15 parts of the firearm for DNA.

16 Q Just describe to the jury how you processed that
17 particular gun?

18 A There are certain parts of the firearm that are
19 touched the most times, like the trigger, trigger guard, the
20 handle of the firearm, and also the slide grip on top of the
21 firearm, so I take a separate swab for each item and I swab
22 those particular items, try to recover DNA from them.

23 Q Officer, what did you do with those swabs once you
24 finished swabbing that firearm?

25 A I vouchered it.

si

29a

122

P.O. Kevin Hutchinson - Direct - Raskin

1 Q What voucher number did you voucher those swabs?

2 A Voucher number 3000162090.

3 Q What did you do with the property after it was
4 vouchered under voucher number 3000162090?

5 A I sent it to the OCME for DNA analysis. OCME stands
6 for Office of the Chief Medical Examiner.

7 Q For what purposes were the swabs sent there?

8 A For DNA analysis.

9 Q From your observations of the gun with your own eyes,
10 would you be able to tell if there was any DNA on the gun?

11 A No, sir.

12 Q Did you do anything else with the gun at that point?

13 A After that I dusted the firearm for fingerprints.

14 Q How did you dust that gun for fingerprints?

15 A I use a feather duster and dipped it in some white
16 powder and I applied the powder over the entire firearm.

17 Q Were you able to lift any fingerprints from that gun?

18 A No, sir.

19 Q What are some reasons why fingerprints from a person
20 who just touched the gun may not be on that gun?

21 A Well, sometimes the firearm could be wiped clean, and
22 also some firearms are made where they will not rust so water
23 can't penetrate. So fingerprints are mostly water so a
24 fingerprint won't adhere to the firearm. It could also be
25 because of the weather. Sunlight and heat will evaporate any

si

P.O. Kevin Hutchinson - Direct - Raskin

1 secretions left on a firearm. Cold weather would prevent a
2 person from perspiring too often, so you won't be able to
3 fingerprint a firearm because of that. And also if it is
4 raining, items left out in the rain, it could wash away the
5 prints also.

6 MR. RASKIN: Thank you, Officer. No further
7 questions, Your Honor.

8 MR. HUGHES: Thank you, Your Honor. Your Honor,
9 is it all right if I cross from the defense table?

10 THE COURT: Go right ahead.

11 CROSS EXAMINATION

12 BY MR. HUGHES:

13 Q Good afternoon, Officer Hutchinson.

14 A How are you doing, sir?

15 Q I'm well, thank you.

16 Now, you were just talking about fingerprinting the
17 gun and some reasons why you might not be able to get
18 fingerprints.

19 Now, prior to dusting the gun for fingerprints, you
20 had applied a moistened Q-tip, basically, to three parts of the
21 gun; right?

22 A Correct.

23 Q That was to the trigger and the trigger guard?

24 A Correct.

25 Q And that was to the back strap and the grips?

si

31a

124

P.O. Kevin Hutchinson - Cross - Hughes

1 A Right, the handles of the firearm.
2 Q And the slide?
3 A Correct.
4 Q And that might be a reason, applying a moistened Q-tip
5 might be a reason to rub off some --
6 A For those parts of the firearm, correct.
7 Q And you've been trained to swab those three areas;
8 right?
9 A Yes, sir.
10 Q And you are trained that those areas are potentially
11 good areas for collecting skin cells that have been rubbed off;
12 right?
13 A Correct.
14 Q And then those skin cells could be analyzed at the
15 lab?
16 A Yes.
17 Q And on the trigger, trigger guard, you could get skin
18 cells potentially from someone whose got their index finger on
19 that area of the gun; right?
20 A Yes.
21 Q Either when they are firing it or when they are just
22 holding it?
23 A Just holding it.
24 Q Now, part of your job in processing a firearm is to
25 question about elimination samples; correct?

si

32a

125

P.O. Kevin Hutchinson - Cross - Hughes

1 A Correct.

2 Q And that sample would be a Q-tip as well put in the
3 cheek of someone who may have touched the evidence; right?

4 A Correct.

5 Q And in order to determine who needs to give an
6 elimination sample, you need to find out who may have touched
7 the gun; right?

8 A Correct.

9 Q And you are also trained that DNA can actually
10 transfer from one item to another; right?

11 A Correct.

12 Q For example, from a glove of a gun, if someone touches
13 their face before touching the gun with their gloved hand;
14 right?

15 A Yes, sir.

16 Q And DNA can be transferred by someone who was touching
17 the outside of their gloves as they were putting them on, if
18 they were -- or in another way before they touched the item?

19 MR. RASKIN: Objection, Your Honor.

20 THE COURT: Sustained.

21 Q So one of the things that you do when you are trying
22 to find out who to request elimination samples from is to find
23 out any NYPD officers who actually recovered the evidence at
24 the crime scene wherever the gun was recovered; right?

25 A Correct.

si

33a

129

Side bar

1 recovery of the gun?

2 MS. ROSENFIELD: I don't recall off the top of my
3 head. I would have to go out and get my grand jury
4 minutes.

5 THE COURT: Let me see it.

6 These minutes were turned over to you, the grand
7 jury minutes?

8 MR. HUGHES: Yes.

9 THE COURT: What's in there about her?

10 MR. HUGHES: I think my recollection is she
11 recovered the gun.

12 MS. NARUMANCHI: That was my recollection, too.

13 THE COURT: So she testified in the grand jury
14 that she was the recovering officer.

15 MR. HUGHES: Correct.

16 THE COURT: This guy here testified that he was
17 the recovering officer.

18 MR. HUGHES: Yes, you mean Thomas.

19 MS. NARUMANCHI: Yes.

20 MR. HUGHES: Correct.

21 THE COURT: Well, it was a full statement she
22 allegedly gave this ETC guy.

23 MR. HUGHES: Is that he recovered the gun on the
24 sidewalk at the corner of Fulton and Pennsylvania.

25 THE COURT: I'll let it in. Let's go.

si

130

Side bar

1 MR. HUGHES: Full statement? I'll give the full
2 statement or that she recovered the gun?

3 THE COURT: Give the statement she gave him, but
4 I'm giving a curative instruction for the purpose of the
5 submission.

6 MR. HUGHES: Okay.

7 (Back in open court.)

8 CROSS EXAMINATION - CONTINUED

9 BY MR. HUGHES:

10 Q So to repeat, Officer Hutchinson, Police Officer
11 Lisette Jordan told you that she had recovered the gun on the
12 sidewalk at the corner of Fulton and Pennsylvania?

13 A Correct.

14 THE COURT: Ladies and gentlemen, that's
15 basically a hearsay statement, what one person said to
16 another person outside of court. And the only reason I'll
17 let it in is not for the truth of what was said but to
18 explain what the officer did once hearing that information.

19 Q And you testified earlier you conferred with Police
20 Officer Jordan, and I believe you also conferred with Sergeant
21 Ephraim Hernandez on this case?

22 A That was my sergeant.

23 Q And so based on that, you requested DNA elimination
24 samples; right?

25 A I asked Officer Jordan for an elimination sample.

si

P.O. Kevin Hutchinson - Cross - Hughes

1 Q And did you receive an elimination sample from Officer
2 Jordan?

3 A No, I did not.

4 Q Are officers allowed to decline providing an
5 elimination sample?

6 A They have declined, yes.

7 Q Is that what Police Officer Jordan did in this case?

8 A Yes.

9 Q And you did not request elimination DNA samples from
10 any other officer in this case; right?

11 A No, I did not.

12 MR. HUGHES: May I have a moment, Your Honor?

13 THE COURT: Sure.

14 MR. HUGHES: Nothing further, Your Honor. Thank
15 you, Officer Hutchinson.

16 THE COURT: Okay. Any redirect?

17 MR. RASKIN: Yes, Your Honor.

18 THE COURT: Go right ahead.

19 REDIRECT EXAMINATION

20 BY MR. RASKIN:

21 Q Officer Hutchinson, you mentioned skin cells. Is that
22 something that's tested with a DNA swab that's sent to the
23 OCME?

24 A Yes.

25 Q And would the same effects in terms of whether the

si

36a

132

P.O. Kevin Hutchinson - Redirect - Raskin

1 ability or inability to shed affect the ability to get skin
2 cell samples from a gun as it would with fingerprints?

3 MR. HUGHES: Objection to the opinion testimony.

4 THE COURT: Overruled.

5 A Yes.

6 MR. RASKIN: No further questions, Your Honor.

7 THE COURT: Recross?

8 MR. HUGHES: None. Thank you.

9 Thank you.

10 (Witness excused.)

11 THE COURT: Ladies and gentlemen, unfortunately
12 we are going to have to call it an early day today.
13 The next scheduled witness through no fault of anyone is
14 unable to be here. But I was assured that they would be
15 here bright and early tomorrow. I would anticipate that
16 this case may be in your hands tomorrow or the latest by
17 Wednesday. So we are moving.

18 So keep an open mind, don't form or express any
19 opinions or conclusions with respect to the evidence until
20 this case is submitted to you for your deliberations.
21 Don't discuss this case amongst yourselves or with anyone
22 else. Don't view or visit any place or premise involved in
23 the case. Don't read, listen or view any media reports
24 about the case. Don't surf the internet regarding this
25 case. Accept nothing of value for information about the

si

Proceedings

1 trial. If anyone intends to talk about the case, don't do
2 it.

3 Have a great night. And let's root for those
4 Jets to get a good draft pick this year. And we will see
5 everybody back here tomorrow at 10:00.

6 COURT OFFICER: Jurors.

7 (Whereupon, the jury exits the courtroom.)

8 THE COURT: Okay. I had requested the district
9 attorney at the side bar to notify this Officer Jordan to
10 be here available tomorrow, but the officer should be
11 advised that if she's going to claim the Fifth Amendment,
12 I'm going to allow no questioning regarding any pending
13 cases that she has before her.

14 That being said, does the defense plan on calling
15 her?

16 MS. NARUMANCHI: Judge, we are actually still
17 discussing the issue and would like to consult with my
18 supervisors back at the office.

19 THE COURT: I understand that, but this case has
20 been pending for a considerable period of time, and you are
21 aware of the allegations that are pending against this
22 officer. And as a litigator, one would always plan that
23 your adversary is going to call that witness or try to make
24 their case without them. As experienced attorneys, you
25 would have planned it ahead of time. In realizing the

si

Proceedings

1 rules of evidence, that if you consciously know a person is
2 going to claim the Fifth Amendment, you can't ask the
3 question. So I would not allow you -- I don't think any
4 Judge would allow you to call a witness to impeach your own
5 witness. I just don't think that's done. So you knew that
6 ahead of time.

7 So this woman got a pending case. She's being
8 prosecuted. I can order her in here, but if you are not
9 going to use it, why bother? Why just go through all of
10 that grief, put her through the grief? Her attorney is
11 going to get notified. Everybody is going to be running
12 around like chicken without heads. And 99 percent of the
13 time you are not even going to call her any way.

14 MR. HUGHES: Can we discuss this issue with
15 Mr. Alexander?

16 THE COURT: Sure.

17 MR. HUGHES: Thank you, very much. And we
18 appreciate the Court's intervention in helping --

19 THE COURT: I understand. Calling the witness or
20 not is solely within the power of the attorney.

21 (Pause in the proceedings.)

22 THE COURT: Did you have enough time to consult
23 with your client?

24 MS. NARUMANCHI: Judge, we did speak with our
25 client, and we would like Officer Jordan to be made

si

Proceedings

1 available. We will be putting her on as a witness on our
2 direct case.

3 MS. ROSENFIELD: Your Honor, two pieces of note
4 with respect. First we have some phone numbers that
5 defense could call about getting that officer made present
6 tomorrow, if they want to follow up with that. We will put
7 a notification in through the system as well just so she
8 knows she's being called as a defense witness. We have a
9 number we can give them.

10 THE COURT: I asked Mr. Raskin to advise that she
11 was coming in as a defense witness.

12 MS. ROSENFIELD: Yes, I'm just saying we have a
13 phone number they can contact as well to notify her to come
14 in. We will put it through our system as well, but there's
15 no guarantee that through the system she will get a
16 notification in time, so I have numbers they can call for
17 that.

18 However, I also wanted to follow-up with respect
19 to what her testimony is going to be, in how limited it
20 should be, because I actually just went through the
21 testimony from the hearing where Officer Jordan testified
22 and testified that in fact Officer Thomas was the one who
23 recovered the gun. That's what she responded when I asked
24 her the direct question. And when defense attorney,
25 Mr. Kleiman, at the time, and Clinton Hughes was also

si

40a

136

Proceedings

1 present for that, went back to on redirect, "so you
2 testified that Officer Thomas is the one who recovered the
3 gun?" Her answer was, again, yes.

4 THE COURT: I was unaware of that. It's very
5 difficult to be in a position to make a decision when I am
6 not fully apprized of all of the facts and nuances of the
7 case. I was not the Judge at the hearing. I was faced
8 with a situation where this officer testified that he
9 recovered the gun. I was supplied the grand jury minutes
10 wherein the grand jury minutes the female officer said she
11 recovered the gun. I think it was we or was it we or she?
12 I think it was we.

13 MS. ROSENFIELD: I'll double check so that I don't
14 speak improperly on the record.

15 The question was, "did you recover the black
16 object that you had seen him throw to the floor?"

17 Answer: Yes.

18 THE COURT: Fine. That's what I was showed
19 during the conference, side bar conference. So based upon
20 that, not wanting to have the jury misled by what I
21 perceived to be incorrect testimony of this officer, I
22 allowed in the statement of Officer Jordan to in effect
23 impeaching this officer even though they are told it's not
24 entered for the truth of the matter stated. It's very
25 difficult to un-ring the bell. And jurors many times don't

si

41a

137

Proceedings

1 understand.

2 So that being the case, now I find that the
3 defense was aware that Officer Jordan when she testified
4 under oath at a hearing admitted that her testimony in the
5 grand jury was incorrect, and that her partner Thomas was
6 in fact the person who recovered the firearm as he
7 testified before me. So why, what are you going to --
8 first, I'm somewhat chagrined that the defense did not
9 bring this to my attention since the defense was present at
10 the hearing, I wasn't, and it was misleading the Court by
11 not advising me that this officer had stated at a prior
12 hearing that the officer who testified here, Thomas, did in
13 fact recover the gun. That's one.

14 I'm also a little bit chagrined by the
15 prosecution not bringing that to my attention because I
16 would not have allowed that prior statement to come into
17 evidence. I'm attempting to give a fair trial to both
18 sides and not have this jury misled, but I find them being
19 misled by the attorneys. Probably not, I don't know why,
20 but I'm just getting that opinion.

21 Now knowing the fact that this officer is not
22 supportive of your case, what is your offer of proof to
23 have her called?

24 MS. NARUMANCHI: Well, Judge, we are asking that
25 she be called so that we can put the mugshot photo into

si

42a

138

Proceedings

1 evidence.

2 THE COURT: I already ruled that the mugshot
3 evidence, mugshot photo, as it stands, irrelevant.

4 MR. HUGHES: Judge, you are looking at a photo
5 where a man is wearing a hoodie and a ski vest of a
6 different color.

7 THE COURT: That's not a ski vest that he had on
8 that day, that's a full length parker. Let me see that
9 photo again.

10 MS. NARUMANCHI: It's a ski vest. You could see
11 the gray sleeves through the ski vest.

12 THE COURT: Right you are. It's a full length
13 ski vest. That would open the door for the People on
14 rebuttal to bring in testimony as to every person that was
15 arrested in that precinct, that was housed in the bullpen,
16 the clothing that that person had. It's a trial within a
17 trial. You still haven't convinced me of any testimony
18 from anywhere that that was the clothing your client had on
19 at the time of the crime. It's clearly the clothing he had
20 on at the time that photograph was taken, but not what he
21 allegedly wore at the time of the incident. How is that
22 relevant? I mean there's been no proof that he didn't have
23 an opportunity to change clothes with someone else.

24 MR. HUGHES: It would be nice if the arresting
25 officer could weigh in on it; couldn't she? She was the

si

Proceedings

1 one who had custody of the defendant.

2 THE COURT: I'm not speculating on what this
3 officer could or couldn't testify to. Because you're
4 aware, as I am, that once an arrest is made, the arresting
5 officer places the defendant after paperwork in the
6 bullpen, and there could be countless numbers of other
7 people. There's no testimony that he was placed in a
8 solitary cell in the PD squad. It's speculative. I don't
9 see it.

10 MR. HUGHES: It's speculative that he changed
11 clothes, Judge, and it's speculative that the officer was
12 not able to observe him.

13 THE COURT: I tend to disagree with you because
14 each witness indicated that that was the man that they saw
15 out on the street, all three of them, and the three
16 witnesses identified your client as the person that was on
17 the street in distinctive clothing, and two of them saw
18 that photograph, both identified physically your client and
19 both stated that wasn't the clothes he was wearing at the
20 time they saw him on the street. That's the only thing
21 that's not speculative right now.

22 MR. HUGHES: That theory is that they
23 misremembered that. And the physical evidence that they
24 misremembered that is a guy giving his arrest photo taken
25 with a hoodie and a ski vest after he's being apprehended

si

44a

140

Proceedings

1 and in the custody of the police that have different
2 colors. It's misidentification. That's our defense.
3 THE COURT: What do you have to say?
4 MS. ROSENFELD: The People just would go with
5 what the Court has already said, that you've had three
6 people take the stand and state that at the time of the
7 crime the defendant was wearing -- was a black man wearing
8 a blue vest and a bright yellow hoodie. Two of the
9 witnesses took the stand and identified the defendant in
10 court as the same person they saw wearing a yellow hoodie
11 and a blue vest. And also two witnesses who were shown
12 this photograph said, yes, that is absolutely the
13 defendant, that is not what he was wearing at the time that
14 the crime took place.

15 So I believe putting this photograph in front of
16 the jury is completely misleading. If they have already
17 put forth their theory that there was a second person
18 there -- in their opening that there was a second person
19 who committed this robbery that was also on a bike, and if
20 they want to prove that, that's fine, but to say this is
21 not the wrong -- since they have already said this is the
22 guy who committed the robbery but this isn't what he was
23 wearing at the time, that doesn't go to the fact there was
24 a second person there.

25 THE COURT: The defense isn't limited to what

si

45a

141

Proceedings

1 they stated on an opening. The People by statute must
2 establish all the elements of what they intend to prove in
3 the opening. The defense doesn't.

4 MS. ROSENFELD: I recognize that, Your Honor, but
5 the defense keeps arguing that they have already opened on
6 this issue --

7 THE COURT: That's their problem.

8 MS. ROSENFELD: -- of mistaken identity.

9 THE COURT: That's their problem on what they
10 opened on or didn't. That doesn't affect the rules of
11 evidence. I'm just going now on the rules of evidence,
12 that two people identified that that is a photograph of the
13 defendant but those weren't the clothes he was wearing.
14 How is that not the functional equivalent of a photograph
15 of the crime scene that's taken afterwards where movable
16 objects have changed, like cars, trees on leaves, but the
17 physical stature of the buildings are the same. Here the
18 physical face of the defendant is the same.

19 MS. ROSENFELD: So both witnesses were shown the
20 photos, that this was not a fair and accurate
21 representation of what the defendant looked like at the
22 time that the robbery took place.

23 THE COURT: They said as to clothing but they did
24 say that was the defendant.

25 MS. ROSENFELD: They did say that was the

si

Proceedings

1 defendant. So if they want to redact the photos so it's
2 just of his face, then the People would have no objection
3 to it going into evidence. But as to the clothing, the
4 People would object.

5 THE COURT: If this arresting officer took the
6 stand tomorrow, how would you propose getting this past
7 these evidentiary issues?

8 MS. NARUMANCHI: Well, Judge, I would ask her if
9 it represented a fair and accurate description of what he
10 looked like at the time the photo was taken. I'm not going
11 to ask -- obviously she's going to contradict that that's
12 what he looked like at the scene, but I would ask if that's
13 what he looked like in the precinct, and I could limit my
14 questioning to that.

15 MR. HUGHES: Judge, we are asking -- we are
16 going -- I'm sorry to be a two-headed beast here, but we
17 are going to be arguing to the jury at the end of the day
18 that these people were misremembering that point, that
19 critical point. It was called in, yellow and blue, they
20 thought they got the guy, looking at the face, they got the
21 guy, they processed the guy, the guy is still wearing the
22 hoodie and the vest, they take the picture, and then, you
23 know, then they start going through a process of preparing
24 for trial --

25 THE COURT: Hold for a minute.

si

Proceedings

1 (Pause in the proceedings.)
2
3 MR. HUGHES: Judge, that's going to be our
4 theory, that they misremembered. They thought they got the
5 face. They weren't thinking about vests and hoodies and
6 everything else, they thought they got the guy. And then
7 when the litigation begins and witnesses are prompted and
8 complaints and DDS's and arrest reports are reviewed, and
9 lawyers talk to witnesses, and witnesses talk to lawyers,
at some point there is a misremembering.

10 THE COURT: So your argument is that the clothing
11 that's depicted in this photograph is the same clothing
12 that your client got arrested in?

13 MR. HUGHES: And that they were mistaken. That
14 is our argument, Your Honor.

15 THE COURT: Will they be precluded from bringing
16 in officers to testify that on numerous occasions
17 defendants switch clothing prior to the photograph, or have
18 an opportunity to do so?

19 MS. NARUMANCHI: I mean if that's their cross
20 examination, I think they are entitled to ask that
21 question.

22 THE COURT: Which one is speaking for the team?

23 MS. NARUMANCHI: We would like to operate as
24 siamese twins, Judge, but I will speak for the team.

25 MR. HUGHES: I must say I've never disagreed with

si

Proceedings

1 anything Ms. Narumanchi said.

2 THE COURT: Good.

3 MR. HUGHES: Only desire to add a point or two.

4 MS. ROSENFIELD: Your Honor, the defense has
5 themselves just said that they would expect Officer Jordan
6 to take the stand and say that this was not the clothing
7 that he was wearing at the scene, and that would just
8 testify this was the picture --

9 MS. NARUMANCHI: At the time of arrest in the
10 precinct, that's the question I would be asking.

11 MS. ROSENFIELD: Again, that is irrelevant to what
12 he was wearing at the time of the robbery and when he was
13 stopped by the police officers. What he may or may not
14 have changed into at the time this photograph was taken is
15 irrelevant.

16 MR. HUGHES: Judge, to make a ruling against this
17 would defectively credit in advance all the testimony as to
18 the color of the hoodie and the ski vest. We ask that the
19 Court let that be in the domain of the jury. The
20 prosecution can argue whatever it wants or it can raise
21 issues as long as they are proper in the cross examination
22 of Officer Jordan, if you want to call it cross
23 examination, because I don't think she's going to be
24 hostile to the prosecution here, but that's our theory.

25 THE COURT: Is she being prosecuted for an

si

49a

145

Proceedings

1 Assault 3?

2 MS. ROSENFELD: Yes.

3 THE COURT: By your office?

4 MS. ROSENFELD: No, I believe it's Manhattan.

5 MS. NARUMANCHI: It's in Manhattan. The case is
6 on December 9th in Manhattan Criminal Court.

7 Obviously, Judge, we would not ask her about that
8 as per your ruling on that issue. If it's more than two
9 minutes of direct examination, I will be surprised.

10 THE COURT: She's going to come in and testify
11 that that's a picture of the defendant, but that's not the
12 clothes he had on when she arrested him.

13 MS. NARUMANCHI: Yes.

14 MR. HUGHES: Don't know. We don't know yet, but
15 we know that obviously he was wearing a hoodie and he was
16 wearing a ski vest when he was arrested. He's wearing a
17 hoodie and a ski vest when they take the picture. So I
18 guess it's more of an issue of color than anything else,
19 Judge. So the question is are the witnesses misremembering
20 the color, particularly the civilian witnesses, but also
21 the police witnesses at this point. But I think it's an
22 issue of fundamental fairness that the arrest photo come
23 in. It's not a crazy application. This is something where
24 the defendant was in police custody.

25 Is the 75th Precinct a big changing room where

si

50a

146

Proceedings

1 they just allow all the defendants to switch each others'
2 clothes? Maybe they can bring a witness in to say that,
3 but I thought of it as a precinct where they took reports,
4 perform general law enforcement duties and process arrests.

5 THE COURT: Well, experienced defendants many
6 times attempt to alter their physical appearance after they
7 have been in custody, changing hairstyles, growing hair,
8 switching clothes in the precinct. I've had clients that
9 have done that when I was on the defense, and I had
10 defendants when I prosecuted did that when I was a
11 prosecutor, and I'm sure it happens all the time. Maybe I
12 just have more of a background than you do.

13 MR. HUGHES: I don't now what to say, Judge. I
14 think that the fact that there's a description in the type
15 of clothing, and then there's a picture where the precise
16 type of clothing again but with radically different colors
17 should give -- should be presented to the jury and let them
18 decide.

19 THE COURT: You're also going to be precluded
20 from phrasing any question regarding any injury that your
21 client is alleged to have suffered after he was transported
22 from the crime scene. And no comment about that in the
23 photo, no comment about that if it comes into evidence
24 during your summation.

25 MS. NARUMANCHI: No comment during summation.

si

51a

147

Proceedings

1 THE COURT: Right. Because it's not relevant. I
2 haven't decided on the photo, so I will reserve decision
3 until tomorrow. Both sides should prepare either way.

4 MR. HUGHES: Thank you, Your Honor.

5 THE COURT: Okay. 10:00.

6 (The trial was adjourned to December 2, 2014 at
7 10:00 a.m.)

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

si